UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Missouri Department of Corrections, Movant, versus Richard Jordan and Ricky Chase, Respondents.	Case No. 2:16-MC-9005 Related: 3:15-CV-00295 (S.D. Miss.)

SUGGESTIONS IN OPPOSITION TO MOTION TO QUASH THIRD-PARTY SUBPOENA

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SUGGESTIONS IN OPPOSITION TO MOTION TO QUASH THIRD-PARTY SUBPOENA

Mississippi proposes to execute Richard Jordan and Ricky Chase by the serial intravenous injection of three drugs: midazolam, vecuronium bromide (a chemical paralytic agent), and potassium chloride. To prove this protocol violates the Eighth Amendment, Jordan and Chase must show that an alternative reduces the risk of severe pain, and is both known and available. To meet this burden, Jordan and Chase have pointed to states which have abandoned the three-drug series and now use pentobarbital alone to execute prisoners. Mississippi disputes that pentobarbital is available for purchase by corrections officials for use in executions, and that a single-drug execution protocol is a feasible alternative to its three-drug protocol.

The Missouri Department of Corrections ("the Department") has employed a single-drug protocol, using pentobarbital, in its most recent executions. Jordan and Chase seek discovery from the Department on three sets of facts: (1) the availability of pentobarbital; (2) the factors considered in determining to abandon the three-drug protocol; and (3) the feasibility of the single-drug protocol as an alternative method of execution.

The Missouri Department of Corrections resists this discovery. It claims that (1) the Eleventh Amendment prohibits Federal compulsory process against a state agency; (2) a Missouri statute prohibits the disclosure of execution drug procurement; (3) the "state secrets" and "deliberative process" doctrines protect the information; and (4) the requested discovery is not relevant to Jordan and Chase's claims.

Contrary to the Department's argument, nothing in the Eleventh Amendment shields the states from responding to subpoenas in Federal civil rights cases. Moreover, while the Missouri statute shields the names of "execution team" personnel from disclosure, the Missouri courts do not consider execution drug suppliers to be part of the "execution team." And Missouri's overbroad reading of the "state secrets" and "deliberative process" privileges would sabotage discovery in nearly all Federal civil rights litigation against law enforcement agencies.

The requested discovery is relevant and non-privileged. Jordan and Chase have no other means to secure the information necessary to prove one of the elements of their Eighth Amendment claim. The motion to quash should be denied.

I. THE SUBPOENA DUCES TECUM AND NOTICE OF DEPOSITION SEEK DISCOVERABLE INFORMATION IN JORDAN AND CHASE'S FEDERAL CIVIL RIGHTS LAWSUIT.

A. *The Standard for the Scope of Discovery from Third Parties*

The general standard applicable to the Department's motion is well-settled. "The meaning of 'relevancy' with respect to a third party subpoena has the same broad scope as otherwise permitted under the discovery rules." *Mayhall v. Berman & Rabin, P.A.*, 2013 WL 4496279, *3 (E.D. Mo. 2013), *citing* 8 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2452 (3d ed.2008). FED.R.CIV.P. 26(b)(1), as recently amended, describes the scope of discovery as "any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case," including such considerations as "the importance of the issues at stake in the action" and "the parties' relative access to relevant information."

B. *The Availability of Pentobarbital and the Availability of a One-Drug Protocol Are At Issue in Jordan and Chase's Federal Civil Rights Lawsuit.*

1. To Establish that Mississippi's Execution Protocol is Cruel and Unusual, Jordan and Chase Must Point to a Known and Available Alternative Method of Execution.

In *Glossip v. Gross,* 135 S.Ct. 2726, 2738 (2015), the Supreme Court made clear that death-sentenced prisoners challenging their jurisdiction's method of execution in a Section 1983 civil action have a "burden of establishing that any risk of harm [is] substantial ***when compared to a known and available alternative method of execution***" (emphasis added). The Missouri Department of Corrections has itself asserted this requirement to defeat challenges to Missouri's execution protocol. *Johnson v. Lombardi,* 809 F.3d 388, 391 (8th Cir. 2015); *Zink v. Lombardi*, 783 F.3d 783 F.3d 1089, 1103 (8th Cir. 2015) (en banc). The Eighth Circuit agreed with the Department in both cases.

Given the *Glossip* requirement that Jordan and Chase plead and prove the existence of a known and available alternative method of execution– a requirement championed by the Missouri Department of Corrections – it can hardly be disputed that the availability of alternative drugs and the feasibility of an alternate execution protocol are relevant subjects of inquiry in Jordan and Chase's civil rights lawsuit.

2. Litigation in the Underlying Case Regarding the Availability of Pentobarbital and the Use of a Single-Drug Protocol in Other States

The availability of pentobarbital and of a single-drug protocol are specifically at issue in the Mississippi case. Both the original and the First Amended Complaint raised five claims against Mississippi's execution procedures. The subpoena to the Missouri Department relates to the first and third of these claims, which arise under the Eighth and Fourteenth Amendments. The claims as pled in the First Amended Complaint[1] are as follows:

> Count I.A. (FAC ¶¶ 211-231) asserts that Mississippi's plan to use compounded pentobarbital prior to injection of a chemical paralytic agent and potassium chloride for executing Plaintiffs presented "a substantial risk of serious harm and severe pain" and therefore constituted cruel and unusual punishment forbidden by the Eighth Amendment;
> Count I.B. (FAC ¶¶ 232-253) asserts that Mississippi's plan to use midazolam prior to injection of a chemical paralytic agent and potassium chloride for executing Plaintiffs presented "a substantial risk of serious harm and severe pain" and therefore constituted cruel and unusual punishment forbidden by the Eighth Amendment;
> Count III (FAC ¶¶ 269-283) challenged Mississippi's continued use of a three-drug protocol for lethal injection executions where use of that protocol has been abandoned in the majority of executions, representing the evolving standards of decency which underpin the Eighth Amendment.

a. *Dispute Regarding Availability of Pentobarbital*

On June 22, 2015, alleging that they could no longer secure pentobarbital in any form, that the entirety of their existing supply of pentobarbital sodium API had been destroyed after its expiration date, and that it would be required to revise its protocol to include a different drug in place of sodium thiopental or pentobarbital, Mississippi moved to dismiss the original Complaint for lack of an Article III case or controversy.[2]

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[1] The First Amended Complaint is attached as Exhibit 1.

To support this filing, Mississippi relied on the declaration of Marshall Fisher, the Mississippi Commissioner of Corrections.[3] Commissioner Fisher testified that "MDOC has made numerous attempts to secure a new supply of pentobarbital from multiple sources. To date, all of MDOC's efforts to obtain a new supply of pentobarbital have been wholly unsuccessful." Ex. 3 at ¶ 8. Further Commissioner Fisher declared: "MDOC has been unable to obtain a new supply of pentobarbital, in any form whatsoever, for use in executions, and MDOC does not anticipate being able to obtain a new supply of pentobarbital, in any form whatsoever." Id. at ¶ 9. "Because of the unavailability of sodium thiopental and pentobarbital, . . MDOC's current lethal injection execution protocol must be amended to allow for the substitution of other drugs which will satisfy the requirement in Miss. Code Ann. § 99-19-51 . . . ." Id. at ¶ 10.

On the night of July 28, 2015,[4] Mississippi gave notice that it had promulgated a new lethal injection protocol,[5] adding the following language: "***In the event of the unavailability of a sufficient quantity of Pentobarbital from available sources***, a sufficient quantity of Midazolam will be acquired and administered in the place of Pentobarbital." (emphasis added).

At the hearing on Jordan and Chase's motion for preliminary injunction and Mississippi's motion to dismiss, the Plaintiffs disputed Mr. Fisher's declaration by introducing evidence that other states had recently executed prisoners with pentobarbital.[6] The district court asked

[2] The Motion to Dismiss is attached as Exhibit 2.
[3] Commissioner Fisher's Declaration is attached as Exhibit 3.
[4] Jordan and Fisher's motion for preliminary injunction was scheduled for hearing the following day.
[5] The notice of amended protocol is attached as Exhibit 4.
[6] See Exhibit 5, Excerpts from Transcript of Evidentiary Hearing at 8-11.

Mississippi's counsel regarding the ability of Texas, Georgia and Missouri, among others, to secure pentobarbital for use in executions. Mississippi's lawyer responded:

> At the end of the day, the pleadings we believe and the cases support, that pentobarbital is not available. These other states, we don't know where they are getting it . . . we don't know what the states of Missouri and Oklahoma or these other States that were able to get it, we have no idea where they are getting it from.[7]

The First Amended Complaint was filed on September 28, 2015. That pleading challenged Mississippi's assertion that it could not obtain pentobarbital in any form; in that challenge, Jordan and Chase specifically referenced the ability of the states of Missouri, Georgia and Texas to obtain pentobarbital:

> 185. Furthermore, the July 2015 protocol only provides for the use of midazolam in executions conducted by MDOC where a sufficient quantity of pentobarbital is unavailable.
> 186. Defendants have stated that MDOC is unable to obtain pentobarbital in any form.
> 187. However, other state departments of corrections continue to obtain and utilize compounded pentobarbital in lethal injection executions. The States of Texas and Missouri, not to mention Georgia, have had no difficulty obtaining pentobarbital or using it to carry out executions by lethal injection.
> 188. Texas and Missouri each carried out more executions than any other state in 2014 (10 executions each), and combined, these two states account for 80 percent of the executions in 2015 to date (16 of the 20 executions). All executions conducted by Texas and Missouri in 2014 and 2015 have involved the use of pentobarbital in a single-drug lethal injection protocol.

Ex. 1 at 34-35.

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[7] Ex. 5 at 30-31.

Significantly, as to paragraphs 187-88, the Mississippi Defendants responded that they "lack knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations . . . and therefore deny same." Answer and Defenses[8] at 27.

The Mississippi Defendants have also promulgated interrogatories to Jordan and Chase.[9] These interrogatories underscore that the availability of pentobarbital in either manufactured or compounded form is a central issue in the underlying case:

> **Interrogatory No. 6**: To the extent that Plaintiffs contend that a **FDA-approved form of pentobarbital** constitutes a "feasible and available alternative" for use in the executions of Plaintiffs, identify with particularity and provide the name, location, and contact information of each duly licensed pharmacy, compounding pharmacy, or other supplier from which Defendants can legally obtain a FDA-approved form of that drug for use in executions.
>
> **Interrogatory No. 7**: To the extent that Plaintiffs contend that a **compounded form of pentobarbital** constitutes a "feasible and available alternative" for use in the executions of Plaintiffs, identify with particularity and provide the name, location, and contact information of each duly licensed pharmacy, compounding pharmacy, or other supplier from which Defendants can legally obtain a compounded form of that drug for use in executions that would satisfy the requirements of integrity, purity, and potency described by Plaintiffs in the Amended Complaint.[10]

Similar discovery was propounded by the Mississippi Defendants to Jordan and Chase by way of requests for admissions and requests for production of documents.

Thus, information identifying any potential suppliers of pentobarbital (in either manufactured or compounded form) who are willing to sell to departments of corrections for use in lethal injection executions is "relevant to any party's claim or defense and proportional to the needs of the case" as required by Rules 26 and 45.

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[8] The Mississippi Defendants' Answer and Defenses to Jordan and Chase's First Amended Complaint are attached as Exhibit 6.
[9] The Mississippi Defendants' Interrogatories to Plaintiffs are attached as Exhibit 7.
[10] Ex. 7 at 7 (emphasis in original).

b. *Dispute Regarding Feasibility of One-Drug Execution Protocol*

In Counts I.A, I.B. and III of the First Amended Complaint, Jordan and Chase alleged that a one-drug execution protocol using an overwhelming dose of a barbiturate is a known and available alternative to Mississippi's three-drug protocol under *Glossip*. With respect to the use of compounded pentobarbital as the first drug injected prior to the injection of a chemical paralytic agent and potassium chloride, the Plaintiffs alleged:

> 222. Thus, Mississippi's planned use of compounded pentobarbital as the first drug in a three-drug series, which is completed with the intravenous administration of a chemical paralytic agent and potassium chloride, creates a substantial risk of serious harm and severe pain to Plaintiffs.
>
> 223. There is a feasible alternative which could substantially reduce the risk of severe pain and serious harm presented by the continuous intravenous administration of compounded pentobarbital in combination with a chemical paralytic agent and potassium chloride.
>
> 224. The use of an FDA-approved, ultra short-acting barbiturate in a single-drug protocol is a feasible and available alternative which would significantly reduce the substantial risk of severe pain presented by Mississippi's current procedure. Other jurisdictions have already moved towards the use of a single-drug anesthetic-only protocol.
>
> 225. If no FDA-approved ultra short-acting barbiturate can be legally sold to a department of corrections for use in executions, and only in that event, the use of an FDA-approved short- or intermediate-acting barbiturate in a single-drug protocol is a feasible and available alternative which would significantly reduce the substantial risk of severe pain presented by Mississippi's current procedure.
>
> 226. If the alternatives pled in ¶¶ 224 to 225 are not legally available, and only in that event, the use of an ultra short-acting barbiturate, compounded by a duly licensed compounding pharmacy, tested for integrity, purity, and potency by a laboratory unaffiliated with the compounding pharmacy industry or a

> department of corrections, and used in a single-drug anesthetic-only protocol (without a paralytic agent or potassium chloride), is a feasible and available alternative which would significantly reduce the substantial risk of severe pain presented by Mississippi's current procedure.
>
> 227. If the alternatives pled in ¶¶ 224 to 226 are not legally available, and only in that event, the use of a short- or intermediate-acting barbiturate, compounded by a duly licensed compounding pharmacy, tested for integrity, purity, and potency by a laboratory unaffiliated with the compounding pharmacy industry or a department of corrections, and used in a single-drug anesthetic-only protocol (without a paralytic agent or potassium chloride), is a feasible and available alternative which would significantly reduce the substantial risk of severe pain presented by Mississippi's current procedure.228.Defendants' refusal to adopt these alternatives for the executions of Plaintiffs, in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, constitutes cruel and unusual punishment prohibited by the Eighth Amendment.[11]

The Mississippi Defendants denied the allegations of paragraphs 222-28.[12]

With respect to the use of midazolam as the first drug injected prior to the injection of a chemical paralytic agent and potassium chloride, the Plaintiffs alleged:

> 247. Mississippi's planned use of midazolam as the first drug in a three-drug series, which is completed with the intravenous administration of a chemical paralytic agent and potassium chloride, creates a substantial risk of serious harm and severe pain to Plaintiffs.
>
> 248. There is a feasible alternative which could substantially reduce the risk of severe pain and serious harm presented by the continuous intravenous administration of midazolam in combination with a chemical paralytic agent and potassium chloride.
>
> 249. The use of a single-drug anesthetic-only protocol as set forth in ¶¶ 224 to 227 above is a feasible and available alternative which would significantly reduce the substantial risk of severe pain presented by the use of midazolam as the first drug in a three-drug

[11] Ex. 1 at 40-41.
[12] Ex. 6 at 32-33.

> series. Other jurisdictions have already moved towards the use of a single-drug anesthetic-only protocol.
>
> 250. Defendants' refusal to adopt these alternatives for the executions of Plaintiffs, in the face of their documented advantages, without a legitimate penological justification for adhering to its current method of execution, constitutes cruel and unusual punishment prohibited by the Eighth Amendment.[13]

The Mississippi Defendants denied the allegations of paragraphs 247-50.[14]

With respect to Count III, the Eighth Amendment challenge to the three-drug protocol in any form, the First Amended Complaint alleged that:

> 276. Mississippi's decision to continue use of a three-drug lethal injection protocol runs contrary to the trend towards single-drug anesthetic-only protocols employed successfully by other states in recent years.
>
> 277. No state has used pentobarbital in a three-drug protocol this year (with 20 executions having been conducted by five states to date). Only Oklahoma used pentobarbital in a three-drug protocol in 2014, accounting for just two (2) of the 35 executions conducted by seven (7) states last year.[15]

After summarizing the various protocols used by the executing states (including Missouri) in a chart, Ex. 1 at 51 ¶278, Jordan and Chase alleged:

> 281. It follows that use of the three-drug protocol by Mississippi constitutes cruel and unusual punishment in violation of the Eighth Amendment.
>
> 282. Defendants continued use of a three-drug lethal injection protocol, when other states have abandoned this method in favor of a single-drug, anesthetic-only protocol, violates Plaintiffs' right to be free from cruel and unusual punishment as guaranteed by the United States and Mississippi Constitutions.[16]

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[13] Ex. 1 at 45-46.
[14] Ex. 6 at 34-35.
[15] Ex. 1 at 50.
[16] Ex. 1 at 52.

The Mississippi Defendants denied paragraphs 276, 281, and 282 in their entirety, and alleged that they lacked knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations of paragraphs 277 and 278.[17]

As with the availability of pentobarbital, the discovery propounded by the Mississippi Defendants to Jordan and Chase makes clear that the feasibility of a one-drug execution protocol is at issue in the underlying case:

> **Interrogatory No. 1:** In ¶ 223 of the Amended Complaint, Plaintiffs contend that there are "feasible and available alternative[s] which would significantly reduce the substantial risk of severe pain presented by Mississippi's current procedure." For each drug, protocol, or method of execution that Plaintiffs contend constitutes a "feasible and available alternative" for use in the executions of Plaintiffs, state all facts supporting this contention, identify all documents which support this contention, and identify all persons with discoverable knowledge of any facts supporting this contention.[18]

Thus, the feasibility of implementing a one-drug lethal injection protocol using an overwhelming dose of a barbiturate is "relevant to any party's claim or defense and proportional to the needs of the case" as required by Rules 26 and 45.

II. SOVEREIGN IMMUNITY DOES NOT SHIELD MISSOURI FROM COMPULSORY PROCESS IN A FEDERAL CIVIL RIGHTS CASE.

Missouri first argues that the Eleventh Amendment shields it from the deposition notice and subpoena duces tecum issued by the Southern District of Mississippi. The Department acknowledges that the Eighth Circuit has squarely held that "Governmental units are subject to the same discovery rules as other persons and entities having contact with the federal courts. There is simply no authority for the position that the Eleventh Amendment shields government entities from discovery in federal court." *In re Missouri Dep't of Natural Resources*, 105 F.3d 434, 436 (8th Cir. 1997) (citation omitted).

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[17] Ex. 6 at 37-38.
[18] Ex. 7 at 5.

While, as the Department asserts, the *MDNR* Court stated that "MDNR has not shown how production of these documents infringes on the State of Missouri's autonomy," *id*., that dicta was meant to distinguish the subpoena duces tecum served on MDNR from the attempt to compel the state "to prosecute [a company] at a time and place dictated by the federal courts" in *Thomas v. FAG Bearings, Inc*., 50 F.3d 502 (8th Cir. 1995). Simply put, the result in *MDNR* was not a function of the "showing" made by the Department of Natural Resources, but rather of the less intrusive nature of a subpoena duces tecum.

The Department claims that the holding of *MDNR* has been "called into question" by the Court of Appeals in the later case of *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100, 1104-05 (8th Cir. 2012). The *Alltel* Court, in discussing the effect of tribal immunity on a subpoena duces tecum, did suggest that "we are unwilling to predict how the Supreme Court would decide a case in which disruptive third-party subpoenas that would clearly be barred in a State's own courts are served on a state agency in private federal court civil litigation." *Id*. But the Eighth Circuit did not thereby open the door to district courts to depart from *MDNR,* which expresses the law of the circuit. The panel in *Alltel* could not itself have done so, as "[i]t is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011), q*uoting Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir.2002).

Substantial authority supports the proposition that non-party discovery from a state agency under Rule 45 does not implicate the Eleventh Amendment. In *Laxalt v. McClatchy*, 109 F.R.D. 632, 634 (D. Nev. 1986), the district court observed that under Supreme Court precedent, the

Eleventh Amendment "has been construed to refer to assertions of liability on the state's part and claims for relief against it," not to process seeking production of documents. As the *Laxalt* Court pointed out, "[i]n *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699, 102 S.Ct. 3304, 3322, 73 L.Ed.2d 1057 (1982), the plurality approved the service of process on state officials to secure possession of artifacts held by them. The analogy to the instant proceedings, where inspection and copying of State records is all that is being sought, is apparent." *Laxalt*, 109 F.R.D. at 634.

Another district court noted the absurd, if not perverse, result that would result if states could avoid discovery in Federal civil rights actions by means of the Eleventh Amendment: "[A] plaintiff who sues a state official in his individual capacity, a lawsuit specifically authorized by the United States Supreme Court, will never be able to prove his or her case, if any required proof is in the hands of the State's custodian of records. Such a result is ludicrous." *Allen v. Woodford*, 544 F.Supp.2d 1074, 1079 (E.D.Cal. 2008).

As in *Laxalt*, the *Allen* Court looked to the Supreme Court's interpretation of Eleventh Amendment sovereign immunity:

> Neither the State, nor any of its employees to whom subpoenas have been directed to obtain the information sought, that have been found essential to the prosecution of the Plaintiff's case, are parties, nor has any relief in law or equity been sought against them or the State. No judgment will be issued in this action against the State that could have any conceivable effect on the State treasury; the State custodians are only subpoenaed to produce documents for use in the prosecution of this federal civil rights action. The Non-Parties' assertion that they must comply with the subpoenas in their official capacities as custodians of record is irrelevant; no judgment or other relief of any kind is sought against them in this litigation.

Id.; *accord*, *United States v. Univ. of Mass., Worcester*, 2016 WL 829971 *3 (D. Mass. 2016); *Arista Records LLC v. Does 1-14*, 2008 WL 5350246, *4-5 (W.D. Va. 2008).

In the final analysis, this Court is bound by *MDNR*. Jordan and Chase's discovery subpoena is not barred by the Eleventh Amendment.

III. JORDAN AND CHASE'S DISCOVERY DOES NOT REQUIRE THE PRODUCTION OF PRIVILEGED DOCUMENTS.

A. *Federal Law Governs Privilege Issues in a Federal Civil Rights Case.*

The Department next raises a series of privilege arguments, deriving from its interpretation of Missouri state law. FED.R.EVID. 501 provides, in pertinent part, that "state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." But where the lawsuit involves a violation of Federal law, as Jordan and Chase's does, "common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege." *Id.*; *see Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985). As another district court has persuasively noted:

> [I]n a civil rights case brought under federal statutes, questions of privilege are resolved by federal law. State privilege doctrine, whether derived from statutes or court decisions, is not binding on federal courts in these kinds of cases. It obviously would make no sense to permit state law to determine what evidence is discoverable in cases brought pursuant to federal statutes whose central purpose is to protect citizens from abuses of power by state and local authorities. If state law controlled, state authorities could effectively insulate themselves from constitutional norms simply by developing privilege doctrines that made it virtually impossible for plaintiffs to develop the kind of information they need to prosecute their federal claims.

Kelly v. City of San Jose, 114 F.R.D. 653, 656 (N.D. Cal. 1987), cited with approval in *Witherspoon v. Courtney*, 1992 WL 357496 at *1 (W.D. Mo. 1992). This Court has refused to apply privileges deriving from Missouri state statutes in lawsuits arising under Federal law. *United States v. Margaritas Mexican Restaurant, Inc.*, 138 F.R.D. 566, 568-69 (W.D. Mo. 1991) ("[n]o confidential accountant-client privilege exists under federal law; and in a fundamentally federal proceeding, the court may not recognize a state-created privilege.”).

B. *Missouri Law Does Not Shield the Requested Information from Disclosure.*

But in any event, Missouri law does **not** allow the Department to refuse to produce documents or provide testimony about execution drug purchases. The applicable statute provides:

> The director of the department of corrections shall select an execution team which shall consist of **those persons who administer lethal gas or lethal chemicals and those persons, such as medical personnel, who provide direct support for the administration of lethal gas or lethal chemicals.** The identities of members of the execution team, as defined in the execution protocol of the department of corrections, shall be kept confidential. Notwithstanding any provision of law to the contrary, any portion of a record that could identify a person as being a current or former member of an execution team shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity, the remainder of such record shall not be privileged or closed unless protected from disclosure by law. The section of an execution protocol that directly relates to the administration of lethal gas or lethal chemicals is an open record, the remainder of any execution protocol of the department of corrections is a closed record.

Mo. Rev. Stat. §546.720.2 (emphasis added).

The Department contends that the subpoena duces tecum issued at Jordan and Chase’s request will require disclosure of the identity of current or past members of the “execution team,” because the Department’s director has defined the “execution team” to include “a pharmacist” and “individuals who prescribe, compound, prepare, or otherwise supply the chemicals for use in the lethal injection procedure.”[19]

[19] Affidavit of George A. Lombardi, Doc. 1-1, attached as Exhibit A to the Department’s Motion to Quash, at ¶3.

But the Missouri courts have rejected the Department's broad definition of the members of the "execution team." The Circuit Court of Cole County, Missouri entered judgment after an evidentiary hearing "to resolve which persons meet the statutory definition of 'execution team' under Missouri Revised Statutes section 546.720 and, therefore, whether disclosure of any particular document would identify a member of the execution team." Memorandum Opinion and Order, *Guardian News & Media LLC v. Missouri Dep't of Corr.*, No. 14AC-CC00251 (March 21, 2016) at 1.[20] The Circuit Court held that section 546.720 "limits the execution team to those persons present during the execution who administer or provide direct support for the administration of the lethal chemicals." *Guardian News* at 2 ¶1.

The Department had identified five "medical" entities it considered to be members of the "execution team." M2 and M3 are a nurse and an anesthesiologist who participate in the execution. M5 is a physician who prescribes the pentobarbital for use in executions. M6 are two pharmacists who provide pentobarbital for use in executions, and M7 are another two pharmacists who provide pentobarbital for use in executions. *Id*. at ¶2. The pharmacists (M6 and M7) are not present for the execution. *Id*. at ¶4.

On the basis of the sworn testimony at the hearing, the Circuit Court specifically found that the pharmacists do not administer or provide direct support for the administration of lethal injection chemicals during executions. *Id*. at 3 ¶5. Thus, **the Missouri Court concluded that the pharmacists are not members of the "execution team."** *Id*. at 3 ¶6. Moreover, **the Department conceded that the laboratories that conduct quality tests on the lethal injection drugs are not members of the "execution team."** *Id*. at ¶8.

[20] The Memorandum Opinion and Order is attached as Exhibit 8. The Circuit Judge, Jon E. Beetem, also presides over *Winfield v. Lombardi*, No. 14AC-CC00263 (Cir. Ct. Cole County), cited by the Department. See Doc. 1-5. These cases, and the related case of *Bray v. Lombardi*, 14AC-CC00044 (Cir. Ct. Cole County), are cited by the Department at page 13 of its Suggestions in Support of Motion to Quash.

The central issue in *Guardian News* – whether the identity of suppliers of lethal injection chemicals can be shielded from disclosure as members of the Missouri "execution team" – is not adjudicated in any of the authorities cited by the Department. *In re Lombardi*, 741 F.3d 888, 894 (8th Cir. 2014) (en banc) discussed the "state secrets" privilege issue, but did not decide it:

> The privilege issues are significant and complex, but we express no view on them, because it is clear and indisputable that the discovery ordered by the district court is not relevant to any claim that should survive a motion to dismiss, and that the Director has no other adequate means to attain the relief he desires.

Id.

Moreover, the *In re Lombardi* Court did not have the benefit of a Missouri state court interpretation of the governing state statute. *State ex rel. Mo. Ethics Comm'n v. Nichols*, 978 S.W.2d 770 (Mo. Ct. App. 1998) and *State ex rel. Health Midwest Development Group, Inc. v. Daugherty*, 965 S.W.2d 841, 842-43 (Mo.1998) provide a test for whether the language of a statute creates a privilege. But *Guardian News* answers the narrower question: not whether the identity of members of the "execution team" are privileged, but rather, whether suppliers of lethal injection chemicals are members of the "execution team."

Finally, in *Winfield v. Lombardi*, No. 14AC-CC00263 (Cir. Ct. Cole County) (June 2014), Circuit Judge Beetem held only that a preliminary injunction should not issue with respect to records which would identify suppliers of lethal injection chemicals. But Judge Beetem carefully wrote:

> As to likelihood of success on the merits, the Court notes that the execution protocol statute grants the Director of the Department of Corrections the discretion to define the execution team in the protocol. The Director has chosen to define that term rather broadly. That definition, **at first glance**, would preclude the disclosure requested by the Plaintiff; **though this order is not to be construed as a finding to that effect**.

Winfield (Doc. 1-5), at 2.

Unlike *Winfield*, however, in *Guardian News* Judge Beetem had the benefit of an evidentiary hearing and entered a final judgement – not a preliminary one – interpreting section 546.720.2.

Jordan and Chase's subpoena does not seek disclosure of the identities of the individual employees of the Department who are present at, and assist in, executions in Missouri.[21] The subpoena does seek information related to the availability of pentobarbital for purchase by departments of correction, and whether a one-drug protocol using a lethal dose of a barbiturate is a known, available alternative to Mississippi's three-drug protocol. The disclosure of the identity of pharmacists, pharmacies, pharmaceutical companies, and/or laboratories which could result from the Department's compliance with the subpoena would not violate Missouri Revised Statutes section 546.720.2.

C. *The State Secrets Privilege Does Not Shield the Requested Information from Disclosure.*

It follows from the preceding discussion that the common law "state secrets" privilege does not shield the information sought by Jordan and Chase's subpoena from disclosure. To the extent that *In re Lombardi*, *supra,* and *Am. Civil Liberties Union of Miss., Inc. v. Finch*, 638 F.2d 1336, 1343-44 (5th Cir.1981) recognize the applicability of the "state secrets" privilege to the individual States, they require in the first instance that the disclosure be prohibited by State law. As *Guardian*

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[21] This distinguishes *Ringo v. Lombardi*, 09-4095-CV-C-BP Order Denying Motion to Unseal (W.D.Mo. Jan. 6, 2016). In *Ringo*, a publisher sought disclosure of seven documents filed under seal. The requested documents are described at 3. All seven involved either "M3," otherwise identified as an anesthesiologist, and "M2," a Missouri LPN. *Id*. at 2. *Ringo* therefore did not reach the question whether pharmacists or other suppliers of lethal injection chemicals are protected from disclosure under Missouri or Federal law.

News makes clear, that is not the case with respect to the identity of suppliers of lethal injection chemicals.

Additionally, however, the Department's argument is based factually on the rather thin support of a single letter of a Texas pharmacy from 2013, a law review article, and a handful of news stories. Contrary to the Department's assertions, the pharmaceutical manufacturers themselves take exception to the association of their product with the intentional cessation of human life:

> Long before the recent efforts of death penalty opponents to convince drug companies to disallow their drugs from being used in executions, these companies expressed a desire to disassociate themselves from U.S. executions. Media reports as early as 2001 quoted representatives of pharmaceutical companies as strongly objecting to the use of their products in executions and communicating to prison officials their request that the drugs not be used to end the lives of condemned inmates.

T. Alper, *The United States Execution Drug Shortage: A Consequence of Our Values*, 21 BROWN JOURNAL OF WORLD AFFAIRS 27, 33 (2014).

The article quotes a letter written by the president of Lundbeck, the manufacturer of Nembutal (the FDA-approved manufactured version of pentobarbital) in January 2011 to the Ohio commissioner of corrections, stating "Lundbeck is adamantly opposed to the use of Nembutal, or any product for that matter, for the purpose of capital punishment." *Id.* at 33-34 and at n. 44. *See also* Statement of Akorn Pharmaceuticals (March 4, 2015);[22] Letter of Akorn General Counsel to Attorney General of Kentucky (March 4, 2015);[23] Mylan Statement on Use of Rocuronium Bromide in Lethal Injection (October 15, 2015).[24] These companies are not cowering in the wake of capital punishment abolitionists. They are pharmaceutical firms who do not relish the association of their life-saving and life-enhancing products with death.

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[22] Attached as Exhibit 9.
[23] Attached as Exhibit 10.
[24] Attached as Exhibit 11.

Indeed, since the Texas Department of Criminal Justice received the letter from the Woodlands Compounding Pharmacy in October 2013,[25] recalling drugs intended for use in lethal injections, the State of Texas has carried out 32 executions.[26] Texas does not seem to have difficulty finding suppliers of pentobarbital, despite the loss of the Woodlands Pharmacy.

There are no grounds, factual or legal, for the Department's assertion of the "state secrets" privilege.

D. *The Deliberative Process Privilege Does Not Shield the Requested Information from Disclosure.*

The Department also relies upon the "deliberative process" privilege. It should be noted at the outset that only categories 4 and 6 of the subpoena duces tecum, and topics 6 and 7 of the notice of deposition, could be subject to this privilege.

Courts in the Eighth Circuit have applied the privilege to state or municipal governments.[27] "The purpose of the deliberative process privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny." *Qamhiyah v. Iowa State University of Science and Technology*, 245 F.R.D. 393, 396 (S.D. Iowa 2007).

But the privilege is far from absolute:

> To qualify for the deliberative process privilege, a communication must be both pre-decisional and deliberative. The agency invoking the privilege has the initial burden of showing that it applies; the privilege is to be narrowly construed.

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[25] Attached as Doc. 1-6 to the Department's Motion to Quash.

[26] From the Death Penalty Information Center website, http://www.deathpenaltyinfo.org/views-executions (last viewed June 24, 2016).

[27] Interestingly, the cases cited by the Department all relate to the deliberative processes of Federal agencies or entities.

S.L. ex rel. Lenderman v. St. Louis Metropolitan Police Dept. Bd. of Commissioners, 2011 WL 1899211*3 (E.D. Mo. 2011).

To that end, the agency seeking to invoke the privilege must make a specific showing as to the documents withheld. As the Court in *Lenderman* noted:

> In Jones, the defendants invoked the privilege in response to specific categories of documents. They also presented the claim with sufficient detail to permit the court to complete a meaningful analysis. By contrast, defendants in this matter invoke the privilege in a conclusory manner in an effort to avoid all discovery. Their mere assertion that the privilege applies, without more, is not sufficient to meet their burden.

Id.

In this case, the Department's privilege log (Doc. 1-4) does not describe the documents that it withheld on basis of the "deliberative process" privilege. Twelve documents are listed as being withheld under that privilege, but none are identified with any specificity to allow the Court to determine if the privilege has been properly invoked, and the weight to be afforded to the Department's interests.

The latter point is important, because the "deliberative process" privilege is qualified, not absolute:

> [T]he deliberative process privilege is a discretionary one. In deciding how to exercise its discretion, an inquiring court should consider, among other things, the interests of the litigants, society's interest in the accuracy and integrity of fact-finding, and the public's interest in honest, effective government.

Scott v. City of St. Louis, 196 F.R.D. 551, 555 (E.D. Mo. 2000).

With respect to the interests of the litigants, the court in *Scott* considered "the relevance of the evidence, the availability of other evidence, the government's role in the case, and the extent to which disclosure would hinder frank and independent discussion of the pending decision." *Id*.

Here, the considerations governing the "deliberative process" privilege weigh heavily in Jordan and Chase's favor. First, as detailed above, the subpoena duces tecum and notice of deposition seek documents and testimony directly relevant to the issues in Jordan and Chase's Federal civil rights lawsuit in Mississippi. Second, the subpoena and deposition notice seek information that Jordan and Chase cannot obtain by other means. As demonstrated above, even the State of Mississippi claims to be unable to locate suppliers of pentobarbital for use in lethal injection executions. Third, the decision to use a single-drug protocol for lethal injection executions is not the kind of repetitive deliberation which must be shielded from public view to promote later discussions of the same type. Fourth, the Court cannot fully weigh the Department's assertion of the "deliberative process" privilege without any description of the documents which have been withheld on that basis.

Thus, to the extent that some of the documents and testimony sought by Jordan and Chase could possibly be covered by the "deliberative process" privilege, this Court should find that the qualified privilege is outweighed by the necessity of the discovery sought.

E. *If Necessary, a Protective Order Can Issue to Protect the Missouri Department's Interests.*

The Department has not requested that a protective order be entered to allow Jordan and Chase and the other parties to their litigation[28] to have access to the requested documents and testimony without putting them in the public domain. If the Court finds that some or all of the requested documents and/or testimony implicate the Department's privileges against disclosure, Jordan and Chase are agreeable to a protective order requiring their use to be made under seal and only for purposes of their Federal civil rights lawsuit.

[28] Under Rule 45, of course, any documents secured by a subpoena duces tecum must be made available to all parties.

IV. CONCLUSION

Jordan and Chase have demonstrated both the relevance of the requested documents and testimony, and the lack of any privilege preventing their disclosure. They respectfully request that this Court deny the Department's Motion to Quash and order compliance with the subpoena duces tecum and notice of deposition.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused this pleading to be served on all counsel in this case by filing same with this Court's ECF system.

This the 24th day of June, 2016.

/s/James W. Craig